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No. 304

IN THE

Supreme Court of the United States

October Term, 1962

On Appeal from the Supreme Court of Ohio

IN RE: ESTATE OF LEETHA H. GEER, DECEASED.

FRED S. GEER, EXECUTOR OF THE ESTATE OF LEETHA H. GEER, DECEASED AND FRED S. GEER, INDIVIDUALLY,

Appellants,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS AND STATEMENT OPPOSING JURISDICTION

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APPENDIX 5

SECTION 1105.09 Deposits in name of two or more persons. (GC Section 710-120)

When a deposit is made, in any bank or trust company transacting business in this state, in the name of two or more persons, payable to either or the survivor, such deposit or any part thereof or any interest or dividend thereon, may be paid to either of said persons, whether the other is living or not, and the receipt or acquittance of the person paid is a sufficient release and discharge of the bank for any payments so made.

(3359-7)

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Appellee.

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MOTION TO DISMISS

Appellee in the above-styled cause, pursuant to Rule 16 (1) (b) of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the ground that it does not present a substantial federal question and for the further reason that the judgment rests upon an adequate nonfederal basis.

STATEMENT OPPOSING JURISDICTION

The appellee in the above-entitled cause, for his statement in opposition to appellants' statement as to jurisdiction and in support of appellee's motion to dismiss, respectfully states the following:

I.

STATEMENT OF THE CASE AND FACTS

The appellants are seeking herein a review of unanimous decisions by the Supreme Court of Ohio which dismissed their appeal as of right for lack of a debatable constitutional question and, further, overruled their motion to certify the record of the Mahoning County Court of Appeals to that Court for review, for the apparent reason that the appeal did not present a question of sufficiently public or great general interest.

The instant appeal originated as the result of a statutory amendment enacted by the Ohio General Assembly, effective June 17, 1957. Prior to such date, the Ohio Inheritance Tax Act, Section 5731.01, *et seq.*, Ohio Revised Code, contained a levying provision on joint and survivorship property passing as a nonprobate asset to the surviving joint tenant. Section 5731.02 (E), Ohio Revised Code, *then* read as follows:

> "A tax is hereby levied upon the succession to any property passing, in trust or otherwise, for the use of a person, institution, or corporation, in the following cases:
>
> "• • • • • • • • • • • •
>
> "(E) Whenever property is held by two or more persons jointly, so that upon the death of one of them the survivor has a right to the immediate ownership or possession and enjoyment of the whole property, the accrual of such right by the death of one of them shall be deemed a succession taxable under this section, in the same manner as if the enhanced value of the

> whole property belonged absolutely to the deceased person, and he had bequeathed the same to the survivor by will;
> * * * * * * * * * * * * * *"

Effective June 17, 1957, and upon the instigation of the Probate Code Committee of the Ohio Probate Judges Association, the Ohio General Assembly amended Section 5731.02 (E), Ohio Revised Code, by inserting the following language:

> "* * * provided when the persons holding said property jointly are a husband and wife, the survivor shall be deemed to have a succession taxable to the extent of one-half the total value of the property without regard to enhancement;"

The appellants contend that this amendment violates the due process clauses of the Fifth and Fourteenth Amendments and the equal protection clause of the Fourteenth Amendment, and that it impairs the obligation of contract restriction of Article I, Section 10, all portions of the Constitution of the United States. On behalf of the Tax Commissioner of Ohio, appellee, herein, it is respectfully submitted that the instant appeal does not present a substantial federal question and that the judgment appealed from rests upon an adequate nonfederal basis.

II.

THE INSTANT APPEAL DOES NOT PRESENT AN ADEQUATE FEDERAL QUESTION

The presumption in favor of the constitutionality of statutes applies with added force and weight to laws imposing taxation.

United States v. Jacobs, 306 U.S., 363

All of the appellants' constitutional arguments have been previously passed upon by this honorable Court and have been found lacking.

United States v. Rompel, 326 U.S., 367
Fernandez v. Wiener, 326 U.S., 340
Foster v. Commissioner of Internal Revenue, 303 U.S., 118
Gwinn v. Commissioner, 287 U.S., 224
Tyler v. United States, 281 U.S., 497
Saltonstall v. Saltonstall, 276 U.S., 260
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Moffit v. Kelly, 218 U.S., 400
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III.

THE DECISION OF THE SUPREME COURT OF OHIO RESTS UPON AN ADEQUATE NONFEDERAL BASIS

The construction by the Ohio Supreme Court of Section 5731.02 (E), Ohio Revised Code, is binding upon this honorable Court unless there is a substantial violation of rights under the Constitution of the United States.

United States v. Burnison, 339 U.S., 87
United States v. Fox, 94 U.S., 315

The Ohio State Supreme Court has held the Ohio inheritance tax to be constitutional.

Harvard College v. State, 106 Ohio St., 303

An earlier form of this statute was held not to be unconstitutional by reason of its discrimination between collateral kindred.

Hagerty v. State ex rel. Dyer, 55 Ohio St., 613

The very provision in question has been held to be constitutional by the Ohio Supreme Court.

In re Estate of Evans, 173 Ohio St., 132

The common-law doctrine of the unity of husband and wife is modified in Ohio only so far as it is done by specific statutory provisions.

State v. Phillips, 85 Ohio St., 317

At common law, husband and wife were said to be one person.

Coolidge and Wife v. Parris, 8 Ohio St., 594

Rather than impairing the obligation of contract, as alleged by appellants, the classification in question is founded *upon* contract, i.e, the contract of marriage.

Waymire etc. v. Jetmore and Spencer, 22 Ohio St., 271

Therefore, it seems abundantly clear that a classification for tax purposes, of husbands and wives, as distinguished from other individuals, is so patently reasonable that a review by this Court is wholly unnecessary.

IV.

CONCLUSION

It is respectfully submitted, on behalf of the appellee, that Section 5731.02 (E), Ohio Revised Code, is a valid, constitutional exercise of legislative authority by the Ohio General Assembly. Therefore, appellee respectfully prays that the instant appeal be hereby dismissed.

Respectfully submitted,

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